

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DESHAWN JACKSON,

Petitioner,

v.

CHRISTIAN PFEIFFER, Warden,

Respondent.

Case No. 1:21-cv-00250-SKO (HC)

FINDINGS AND RECOMMENDATION TO
DISMISS SUCCESSIVE PETITION FOR
WRIT OF HABEAS CORPUS

ORDER DIRECTING CLERK OF COURT
TO ASSIGN DISTRICT JUDGE

[TWENTY-ONE DAY OBJECTION
DEADLINE]

Petitioner is a state prisoner proceeding *pro se* and *in forma pauperis* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On February 23, 2021, Petitioner filed the instant petition for writ of habeas corpus in this Court. Because the petition is successive, the Court will recommend it be **DISMISSED**.

DISCUSSION

Rule 4 of the Rules Governing § 2254 Cases requires the Court to make a preliminary review of each petition for writ of habeas corpus. The Court must dismiss a petition "[i]f it plainly appears from the petition . . . that the petitioner is not entitled to relief." Rule 4 of the Rules Governing § 2254 Cases; see also Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990). A petition for habeas corpus should not be dismissed without leave to amend unless it appears that no tenable claim for relief can be pleaded were such leave granted. Jarvis v. Nelson, 440

1 F.2d 13, 14 (9th Cir. 1971).

2 A federal court must dismiss a second or successive petition that raises the same grounds
3 as a prior petition. 28 U.S.C. § 2244(b)(1). The court must also dismiss a second or successive
4 petition raising a new ground unless the petitioner can show that 1) the claim rests on a new,
5 retroactive, constitutional right or 2) the factual basis of the claim was not previously
6 discoverable through due diligence, and these new facts establish by clear and convincing
7 evidence that but for the constitutional error, no reasonable factfinder would have found the
8 applicant guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(A)-(B). However, it is not the
9 district court that decides whether a second or successive petition meets these requirements.

10 Section 2244 (b)(3)(A) provides: "Before a second or successive application permitted by
11 this section is filed in the district court, the applicant shall move in the appropriate court of
12 appeals for an order authorizing the district court to consider the application." In other words,
13 Petitioner must obtain leave from the Ninth Circuit before he can file a second or successive
14 petition in district court. See Felker v. Turpin, 518 U.S. 651, 656-657 (1996). This Court must
15 dismiss any second or successive petition unless the Court of Appeals has given Petitioner leave
16 to file the petition because a district court lacks subject-matter jurisdiction over a second or
17 successive petition. Burton v. Stewart, 549 U.S. 147, 152 (2007); Cooper v. Calderon, 274 F.3d
18 1270, 1274 (9th Cir. 2001).

19 In this case, Petitioner challenges his 1994 conviction in the Fresno County Superior
20 Court for second degree murder. He raises claims of actual innocence, prosecutorial misconduct,
21 cruel and unusual punishment, and trial court abuse of discretion. Petitioner previously sought
22 federal habeas relief in this Court with respect to the same conviction. See Jackson v. Walker,
23 Case No. 1:08-cv-00949-SMS (dismissed as untimely); Jackson v. Biter, Case No. 1:14-cv-
24 01213-SAB (dismissed as successive).

25 The Court finds that the instant petition is "second or successive" under 28 U.S.C. §
26 2244(b). See McNabb v. Yates, 576 F.3d 1028, 1030 (9th Cir. 2009) (holding "dismissal of a
27 first habeas petition for untimeliness presents a 'permanent and incurable' bar to federal review
28 of the underlying claims," and thus renders subsequent petitions "second or successive").

1 Petitioner makes no showing that he has obtained prior leave from the Ninth Circuit to file his
2 successive petition. Therefore, this Court has no jurisdiction to consider Petitioner's renewed
3 application for relief under 28 U.S.C. § 2254 and must dismiss the petition. See Burton, 549 U.S.
4 at 157.

5 **ORDER**

6 Accordingly, the Clerk of Court is DIRECTED to assign a District Judge to this case.

7 **RECOMMENDATION**

8 For the foregoing reasons, the Court HEREBY RECOMMENDS that the petition be
9 DISMISSED as successive.

10 This Findings and Recommendation is submitted to the United States District Court Judge
11 assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 304
12 of the Local Rules of Practice for the United States District Court, Eastern District of California.
13 Within twenty-one (21) days after being served with a copy, Petitioner may file written objections
14 with the Court. Such a document should be captioned "Objections to Magistrate Judge's
15 Findings and Recommendation." The Court will then review the Magistrate Judge's ruling
16 pursuant to 28 U.S.C. § 636 (b)(1)(C). Petitioner is advised that failure to file objections within
17 the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951
18 F.2d 1153 (9th Cir. 1991).

19
20 IT IS SO ORDERED.

21 Dated: February 25, 2021

/s/ Sheila K. Olerto
UNITED STATES MAGISTRATE JUDGE